HIGH DESERT COMMUNICATIONS, INC.

IBLA 92-138 Decided April 24, 1992

Appeal from a decision of the Barstow Resource Area Office, Bureau of Land Management, assessing liability for communication site trespass. CA-27194 and CA-28766.

Affirmed as modified.

1. Administrative Procedure: Administrative Review--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Motions--Rules of Practice: Appeals: Stay

   Review of the merits of a trespass case may be expedited by the Board where the decision is made effective by regulation pending appeal and review of a motion for stay discloses a conflict between the threat of injury to the appellant and the threat of adverse effect to the public interest.

2. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally-- Trespass: Generally--Trespass: Measure of Damages

   Any use or occupancy of the public lands such as for radio broadcasting which requires a right-of-way or temporary use permit, which use has not been authorized, is prohibited and shall constitute a trespass for which the trespasser is liable for administrative costs, damages, and penalties under the regulations at 43 CFR 2801.3.

3. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally-- Trespass: Generally -- Trespass: Measure of Damages

   An assessment of damages for a willful trespass is properly affirmed where appellant's conduct constituted a voluntary or conscious trespass in that the evidence shows appellant knew of the lack of authority to use the public lands for communication site purposes.

APPEARANCES: Jay Corbin, General Manager, for appellant; Gerald E. Hillier, District Manager, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

High Desert Communications, Inc., has appealed from a decision of the Barstow Resource Area, Bureau of Land Management (BLM), dated November 5, 1991, fixing appellant's liability for a communication site trespass at $2,536.00. The decision followed up on prior agency correspondence, dated September 17, 1991, notifying appellant of certain allegations which, if true, would support a finding of trespass. This prior notice granted appellant 10 days to remove its structures (metal building, antennas, cables, etc.) from the public lands and settle its trespass liability or to present evidence showing that no trespass had occurred.

The BLM decision under appeal stated that appellant had failed to comply with the September 17 notice or respond with new information. The agency, therefore, directed appellant to remove its structures and pay the amounts due as a first step towards resolution of the trespass. Two weeks were allowed for completion of these tasks. The decision further noted that the regulation at 43 CFR 2801.3 provides that failure to satisfy trespass liabilities shall result in denial of any pending land-use application. The record reveals that appellant has filed a right-of-way application which BLM regards as incomplete.

On November 18, 1991, appellant filed with the Board of Land Appeals a motion for stay of BLM's November 5 decision. In this pleading, appellant correctly noted that under the relevant regulation BLM's decision is effective pending appeal. However, the regulation also authorizes the filing of a motion for stay of the decision. 43 CFR 2804.1(b). Appellant argues that removal of its transmitter and building from BLM lands will cause irreparable injury to its business interest, radio station KQYN-FM, and BLM would not be injured in any way if a stay is granted. Because appellant failed to provide any evidence that a copy of the motion was filed with the Regional Solicitor, counsel for BLM, as required by the regulations, 43 CFR 4.413, we served a copy upon the Solicitor by order of January 30, 1992. See 43 CFR 4.27(b). That order allowed 30 days for a response on behalf of BLM and additional time was allowed for appellant to reply to the BLM answer. The District Manager, California Desert District, BLM, has filed an answer on behalf of BLM and appellant has recently filed a response.

It appears from the record that appellant had been broadcasting since 1985 from Copper Mountain using a transmitter situated within a Marine Corps building located on public lands. Appellant's signal had been broadcast from an antenna mounted on a nearby tower owned by Southern California Edison (SCE) situated within a right-of-way (R-04779) issued by BLM to SCE. 1/ In a prior application (CA-27194) filed with BLM on

1/ The authority under which appellant's past operations had been conducted prior to the relocation of appellant's transmitter does not appear in the record. Although appellant refers to an oral lease from the Navy, there is no indication of the authority under which such a grant could be made. Secondary users of buildings and towers on existing communication site

April 23, 1990, seeking a communication site right-of-way located within the boundaries of the SCE right-of-way, Jay Corbin, appellant's general manager, indicated that the lease of appellant's former transmitter site would expire on December 31, 1990. After receiving notice of the filing of appellant's application involving use of its site and tower, SCE advised BLM by letter of June 7, 1990, that it intended to terminate its agreement with appellant authorizing the use of the SCE tower for mounting the antenna used by appellant to broadcast its signal.

By letter dated August 16, 1990, BLM advised appellant that under the relevant right-of-way regulations a cost-recovery fee in the amount of $300 would be required to cover the costs of processing right-of-way application CA-27194 and a communications site plan would also be required. In a decision dated March 1, 1991, BLM rejected appellant's right-of-way application for failure to tender the fee and the site plan, subject to appellant's right to comply with these requirements within 30 days. It appears from the record that appellant did not respond to this decision and that appellant decided not to pursue this application further. Subsequently, by letter dated June 11, 1991, appellant requested that BLM "authorize a temporary permit for us to locate our transmitter in a temporary building adjacent to [SCE]'s right-of-way." 2/ A log of a subsequent telephone conversation dated August 5, 1991, indicates that appellant had placed a structure with a microwave antenna mounted on top on a site on the public lands adjacent to the Marine Corps building with electric power supplied from a meter on the Marine Corps building.

This sequence of events led to issuance of the trespass notice of September 17, 1991, charging appellant with trespass in placing "a metal building, antennas, wooden posts, cable and foam insulation material on the public lands" without authorization in violation of law. In responding to the notice, appellant did not deny the trespass, acknowledging in a letter dated October 11, 1991, that "our presence on Copper Mountain does not now conform to BLM regulations and we propose that KQYN and BLM work together to resolve the current trespass issue." As an enclosure with the letter, appellant submitted another right-of-way application purporting to describe

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fn. 1 (continued)
rights-of-way on the public lands must be authorized by BLM. 43 CFR 2801.1-1(f); see James W. Smith, 34 IBLA 146, 149-150 (1978). Rights-of- way for broadcast (communication) site purposes are issued by BLM pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988). There is no evidence of a right-of-way authorizing either the transmitter or appellant's broadcast antenna on the SCE tower.

2/ Although the record does not disclose a response by BLM to the June 11 request, we note that an applicant for a temporary use permit or right-of- way is required to reimburse the United States in advance "for the expected reasonable administrative and other costs incurred by the United States in processing the application." 43 U.S.C. § 2808.1(a). Appellant had previously declined to do this as required by BLM letter of Aug. 16, 1990, and decision of Mar. 1, 1991.

the site embracing the trespass structure. Thereafter, BLM issued the trespass decision of November 5, 1991, which is the subject of this appeal.

In response to our prior order completing service of appellant's motion for stay, BLM has advised by letter of March 4, 1992, that appellant has continued to erect structures in trespass on the site. BLM indicates that appellant has now erected an "18-20 foot wooden pole and metal extension with two 'bay configuration' antennae." Further, BLM relates that this "tower (approximately 30 feet high) is directly adjacent to the previously cited unauthorized facilities." A stay is opposed by BLM on the ground it may encourage other communication site operators to trespass upon public lands in the hope of obtaining a right-of-way "after the fact" and on the basis that it would "make it impossible for [BLM] to carry out its responsibilities under the Federal Land Policy and Management Act of 1976." With regard to the right-of-way application filed October 11, 1991, BLM contends the application is "incomplete." Although the basis for this conclusion is not specifically stated, BLM has noted that the application calls for use of the SCE tower, despite the fact that "High Desert's agreement with SCE for use of the tower was revoked." It is also noted by BLM that appellant has now moved its broadcast antenna from the SCE tower to the pole erected without authorization on the public lands and, hence, the application does not reflect appellant's current installation. Further, BLM notes the lack of design drawings addressing basic safety standards.

Appellant has responded with a letter of March 11, 1992, detailing the difficulties encountered in seeking a right-of-way to authorize its broadcasting facilities on Copper Mountain. Appellant has explained the necessity of this site for purposes of appellant's broadcasting coverage. Further, appellant has pointed out the costs which would likely be entailed if they are forced to vacate the Copper Mountain site. Appellant has also detailed its difficulties seeking, unsuccessfully, to obtain authorization to use the SCE right-of-way and tower. Further, appellant has related its unsuccessful effort to get a consultant to file an application on its behalf. Additionally, appellant charges BLM with coercing SCE to terminate the agreement allowing appellant to mount its broadcast antenna on the SCE tower. In response to the BLM assertion that the pending right-of-way application is incomplete, appellant contends that BLM has never asked for design drawings and that they would have been provided if requested.

[1] The regulations at 43 CFR Part 2800 governing rights-of-way issued pursuant to Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1988) (the authority pursuant to which a right-of-way for a communication site is issued), provide, contrary to the general rule at 43 CFR 4.21(a), that decisions issued thereunder are to remain effective pending appeal unless the Secretary provides otherwise. 43 CFR 2804.1(b). This regulation also authorizes the filing of a motion for stay of the effect of the decision which appellant has submitted. In the past this Board has found certain factors to be particularly relevant in determining whether to grant a stay of a decision appealed from: likelihood of success on the merits, threat of irreparable injury to the moving party if the stay is not granted, whether the threatened injury to the moving party outweighs the potential harm the stay may cause to the nonmoving party, and whether the stay is

contrary to the public interest. Marathon Oil Co., 90 IBLA 236, 245-46, 93 I.D. 6, 11, 12 (1986); see Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958), followed, Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 842 (D.C. Cir. 1977); Taylor Diving & Salvage Co. v. U.S. Department of Labor, 537 F.2d 819, 821 (5th Cir. 1976); Sun Oil Co., 42 IBLA 254, 258 (1979). After review of the record including the briefing filed in this case, we find that this case entails a serious conflict between the threatened injury to a party seeking a communication site right-of-way and the public interest in proper administration of the statutes and regulations governing public land use. In view of the failure of appellant to show grounds for prevailing in this appeal, the threatened injury to appellant if the stay is not granted, and the adverse effect both upon BLM's ability to administer the public land laws and upon the public interest if a stay is improvidently granted, we find it appropriate to expedite this case on our docket and decide the appeal on the merits.

[2] The decision assessing liability for appellant's trespass recites as authority the regulation at 43 CFR 2801.3. 3/ The regulations at 43 CFR Part 2800 have been promulgated pursuant to the authority of FLPMA, sections 303, 310, and 501-511, 43 U.S.C. §§ 1733, 1740, and 1761-1771 (1988). See 43 CFR 2800.0-3. The regulation cited by BLM provides in part that "Any use, occupancy, or development of the public lands that requires a right-of-way, temporary use permit, or other authorization * * * and that has not been so authorized, * * * is prohibited and shall constitute a trespass as defined in § 2800.0-5." 43 CFR 2801.3(a). Liability for such trespass is governed by subparts (b) and (c) of that regulation and includes several elements. "Reimbursement of all costs incurred * * * in the investigation and termination of such trespass" is required. 43 CFR 2801.3(b)(1). Further, a trespasser is liable for the rental value of the land as provided in 43 CFR 2803.1-2 governing fair market rental value. 43 CFR 2801.3(b)(2). In addition, a trespasser is liable for trespass penalties. For willful trespass, the penalty amount is two times the rental value. 43 CFR 2801.3(c)(2).

[3] The assessment for trespass levied against appellant by the BLM decision under appeal consisted of three separate elements which correspond to regulatory provisions previously described: administrative costs in the amount of $886.09; rental from August 1, 1991, through October 31, 1991, in the amount of $150; and trespass penalties for the same period in the amount of $1,500. The trespass penalty was calculated at the rate for a willful trespass consisting of twice the fair market rental value. The term "willful trespass" is defined in the regulations as follows:

> "Willful trespass" means the voluntary or conscious trespass as defined at § 2801 of this title. The term does not include an

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3/ The decision also cites as authority the regulation at 43 CFR 9262.1. This regulatory provision establishes criminal penalties for knowing and willful violations of the regulation at 43 CFR 2801.3(a). As stated by the regulation, such penalties may be assessed after trial by a United States magistrate and, hence, are outside the jurisdiction of this Board.

> act made by mistake or inadvertence. The term includes actions taken with criminal or malicious intent. A consistent pattern of trespass may be sufficient to establish the knowing or willful nature of the conduct, where such consistent pattern is neither the result of mistake or inadvertence. Conduct which is otherwise regarded as being knowing or willful does not become innocent through the belief that the conduct is reasonable or legal. 43 CFR 2800.0-5(v).

Reviewing the record in this case including appellant's motion and supporting documentation, we note that the existence of the trespass as charged by BLM is undisputed. Subsequent to the rejection of appellant's prior right-of-way application by decision of March 1, 1991, no effort was made to resolve the problems leading to rejection of that application. Rather, appellant moved his broadcasting equipment onto the public land without any authorization. It is clear from circumstances set forth in the record, especially the rejection of appellant's prior application, that the trespass was willful, i.e., appellant knew the installation was made without authorization. Placement of broadcasting facilities on the public lands under such circumstances is clearly not the result of mistake or inadvertence. Indeed, there is an indication in a BLM telephone log in the file dated August 7, 1991, that a notice of location of a millsite claim dated August 1, 1991, was posted by appellant on a wooden post adjacent to the structure. 4/ Accordingly, the decision of BLM finding appellant liable for willful trespass and requiring payment of administrative costs, the fair market rental value, and trespass penalties in the amount of twice the fair market rental value as required by 43 CFR 2801.3 must be affirmed.

With respect to the amount of liability for the rental and trespass penalties, we note, however, that the fair market rental value of the site has been determined on a basis which is somewhat inconsistent with the calculation of the penalty amount. The regulation at 43 CFR 2801.3(b)(2) requires that the rental value be determined under the regulation at 43 CFR 2803.1-2. The rental for communication site rights-of-way shall be based on a market survey of comparable rentals. 43 CFR 2803.1-2(c)(3)(i). The measure of damages for willful trespass is also tied to this standard, consisting of two times the fair market rental value amount. 43 CFR 2801.3(c)(2). The BLM decision based its rental value on a 1977 appraisal at $900 per year. However, this appraisal was deemed by the BLM appraiser to be not reflective of current market rental value (Memorandum of Oct. 25, 1991, to BLM Area Manager, Barstow). In view of the unreliability of the 1977 appraisal, the appraiser considered available market data regarding communication leases and, on this basis, concluded the rental value of a site on Copper Mountain was from $4,000 to $5,000 per year. The appraiser found that the midpoint of this range was a "reasonable estimate for current

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4/ Occupancy of a millsite claim for purposes not related to mining operations constitutes a trespass itself. Jim D. Wills, 113 IBLA 396 (1990).

purposes." Id. The midpoint value of $4,500 per year was used in the BLM decision as the basis for calculating the trespass penalty. Appellant has made no showing that this is not reflective of fair market rental value for a communication site on Copper Mountain. We find that this figure should have been used as the measure of rental value as well in these circumstances where the 1977 appraisal was found to be unreliable. Hence, the amount of the rental liability incurred by appellant is properly calculated at the rate of $ 375 per month.

Further, we note that the liability for rental and for trespass penalties for the period of August 1, 1991, through October 31, 1991, was calculated on the basis of 2 months. However, this interval actually constituted 3 months. Hence, the rental liability is $375 per month times 3 months and the trespass liability is $750 per month times 3 months. Accordingly, the assessment of liability for rental and trespass penalties is affirmed as modified.

In view of our decision on the merits of this case upholding the BLM finding of a willful trespass, we find there is no basis for issuing a stay in this case. We recognize that after receipt of BLM's September 17, 1991, notice of trespass, appellant, acknowledging in an October 11, 1991, letter to BLM that "our presence on Copper Mountain does not now conform to BLM regulations," filed another right-of-way application with BLM. The filing of an application under 43 CFR Part 2800 does not authorize the applicant to use or occupy the public lands for right-of-way purposes except as provided by 43 CFR 2802.1(d) for "casual acts related to data collection necessary for the filing of an acceptable application" prior to written authorization by BLM and any unauthorized use or occupancy constitutes a trespass for which the trespasser is liable for costs, damages, and penalties as provided in the regulation at 43 CFR 2801.3 discussed previously. 43 CFR 9239.7-1. Further, no new permit, authorization, or grant of any kind shall be issued to the trespasser until the trespass claim is fully satisfied. See 43 CFR 2801.3(e); 9239.7-1. Accordingly, we find no basis for entry of a stay and the motion is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion for stay is denied and the decision appealed from is affirmed as modified.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge